IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, et al.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellee.

Appeal from the District Court of The United States for The Northern District of Illinois.

APPELLEE'S BRIEF.

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Appellee.

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APPELLEE'S BRIEF.

JURISDICTION OF THIS COURT.

Prior to this Court's ruling on appellants' jurisdictional statement, appellee filed his statement in reply thereto and included therein his motion in the alternative to dismiss or affirm.

The ground of opposition was that the questions raised by appellants were so unsubstantial as to require no further argument. Except for that it was, and is, conceded

that this Court is authorized to and should take jurisdiction of the appeal under the applicable statute (28 U.S.C. 380). Appellee's motions are now renewed.

STATEMENT OF THE CASE.

As appellants' statement does not contain all that is material to a determination of the questions presented and is in some respects inaccurate this further statement becomes necessary.

Submission and Decision in the District Court.

The appellants filed no answer below and elected to stand upon their motion to strike the complaint and dismiss the cause, thereby admitting all facts set out in the complaint and Exhibits A, B, and C thereto attached (R. 1-37, 50).

On the final hearing the Court had before it the sworn complaint, and the supporting evidence received at the preliminary hearing, which included the full texts of the reports and orders of the Interstate Commerce Commission pleaded in the complaint. The Court also had before it in the briefs (1) an order of the Interstate Commerce Commission in its Docket No. 11860, a proceeding entitled "Montana Rates and Fares" entered March 24, 1942, a copy of which is attached hereto as Appendix A, and (2) the opinion of a New York Supreme Court judge in *Transit Commission* v. *Long Island R. Co.*, 33 N.Y.S. (2) 993, a copy of which is attached to appellants' brief on this appeal as Appendix A (R. 50).

The findings and conclusions made by the District Court are full and complete (R. 50-56). They set forth the controlling facts established by the complaint and submission of appellee and sustain appellee's complaint and position throughout.

Quite contrary to the statement in appellants' brief (p. 5) that appellee relies *alone* upon the Ex Parte 148 order, the Court found the appellee's right to charge the increased fares had its inception in a previous order of the Commission entered in 1925, in Docket No. 11703 (complaint VII-IX and Ex. A; R. 6-10, 19-31), by which the Chicago and North Western Railway Company was "notified and required * * * to establish, put in force and maintain" the fares charged by appellee prior to March 8, 1942 (R. 31). Having specifically retained and exerted a continuing jurisdiction over those prior existing fares, the Commission in its 1942 order, in Ex Parte 148, by specific reference to Docket No. 11703, *modified* its 1925 order so as to authorize and permit the filing of tariffs increasing the fares ten per cent (Ex. B, R. 32-4). The *continuity* of the Commission's *control* of these fares and *modifying character* of the 1942 order were both pleaded by appellee (R. 7-10) and found by the court (R. 51-3). The court concluded and held (findings 2 and 3, R. 55):

> "The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained. By virtue of its orders referred to in the foregoing findings, the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illinois Commerce Commission without power to act with respect thereto.
>
> "The passenger fares established by the said tariffs which became effective March 8, 1942, are the lawful existing passenger fares which plaintiff is entitled to collect and retain."

After the District Court granted the interlocutory injunction herein and some weeks prior to the final hearing, the Commission entered its order of March 24, 1942 in Docket No. 11860, Montana Rates and Fares (Appendix A hereto). Without objection, the Court took judicial notice of that order and it was before the Court in appellee's brief at the hearing (R. 50).[1] That order was entered by the Commission for the sole purpose of reinstating its 1921 section 13 order establishing intrastate passenger fares in Montana in order that the 1921 order would be restored to the status of an "outstanding" order and thereupon be "modified" by the Ex Parte 148 order so as to permit and authorize the ten per cent increase in the Montana intrastate fares, in exactly the same manner that the District Court here has held appellee's 1925 order was modified. While none of the parties here were parties in the Montana proceeding, this last order therein is relevant and important because it fully confirms the character, purpose and effect of the Ex Parte 148 order. This confirmation, coming as it does from the Commission itself is pertinent and authoritative. It was entered subsequent to the New York Supreme Court decision above mentioned. It may well be held sufficient to relieve this Court from any necessity to consider appellant's argument based upon the New York decision (Appellants' point II, Br. 29-34). The Montana order is not mentioned in appellants' brief, however, and their argument proceeds as though it had not been entered.

The Court further found that the purport and effect of the so-called suspension order of the appellant Commission (Complaint, Ex. C; R. 35-7) was to prescribe intrastate passenger fares to be charged by the appellee from and

[1] In such circumstances the federal courts take judicial notice of Interstate Commerce Commission reports, orders and publications. *Terminal R. Ass'n of St. Louis* v. *Kimbrel*, 105 F. (2d) 262, 263; *Denver Union Stock Yard Co.* v. *U. S.* 21 F. Supp. 83, 87; *N. J. & N. Y. R. Co.* v. *United States*, 80 Ct. Cl. 243; *Morgan's La. & T. R. & S. S. Co.* v. *Isaac Jordan Iron Co.*, 243 F. 149, 151-3.

after February 18, 1942 at the pre-existing level and to prohibit appellee from increasing or modifying the same until further order of the appellant Commission at some indefinite time in the future; that the fares so purported to be fixed and prescribed by the appellant Commission were noncompensatory in that they would not produce sufficient revenue for appellee to meet appellee's expenses of rendering the transportation service involved; that said services were then being rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property used therein; and that the increased fares then being collected pursuant to the authority of the Ex Parte 148 order and under the protection of the interlocutory injunction were still insufficient to meet the cost of the service which was still being rendered at a loss and without any return upon the property investment at the time of the final hearing (R. 53-4). These findings were in accord with the allegations of the complaint, admitted by the appellants' motion (Complaint XIV, R. 14-15), from which it also appeared that the increase in fares involved in this suit aggregates well in excess of $60,000 per year (Complaint XVI; R. 16). The Court concluded that enforcement of the rates prescribed by the appellant Commissions's so-called suspension order would be noncompensatory and confiscatory and the enforcement of the order would deprive appellee of his property without due process of law in violation of Amendment XIV (R. 56). Appellants' statement of the case omits any reference to these findings and conclusions and seeks avoidance of any discussion of this independent and separate ground of the District Court's decision by an assertion that the complaint "is not conceived in form or substance upon the theory that it asserts a right to have the propriety of the schedule of increased rates determined by a court inde-

pendently of and without regard to the order of the Commission" (Appellants' Brief, 5).

Appellee's complaint set up this independent ground of relief and the Court sustained it in addition to sustaining the validity of the increased rates established by the tariffs filed under the authority and direction of the Ex Parte 148 order. Appellee submits the decision below is well supported on both grounds and that upon either ground the judgment below should be affirmed.

ARGUMENT.

I.

Appellee's Authority to Charge the Increased Passenger Fares Derives from a Connected Series of Interstate Commerce Commission Orders by Which That Commission Exercised Its Paramount and Exclusive Jurisdiction Over the Intrastate Rates Here Involved.

The Interstate Commerce Commission first exerted its power and authority over these Illinois intrastate suburban passenger fares of the appellee in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois, Docket No. 11703," in which the 1925 report and order (102 I.C.C. 479, Exhibit A attached to the complaint; R. 19-34) were entered. That 1925 order was a supplemental order dealing only with these passenger fares of Chicago and North Western Railway Company, whose property and affairs are now possessed and operated by appellee as trustee. The report refers to the original order in that proceeding, reported at 59 I.C.C. 350 (R. 20). As shown at page 352, the original proceeding was conducted and these orders entered pursuant to paragraphs (3) and (4) of section 13 of the Interstate Commerce Act (49 U. S. Code, Sec. 13(3)-(4); Appendix B, hereto). The original report discusses and points out the paramount power which Congress had conferred upon the Commission by these paragraphs with respect to intrastate rates where discrimination against interstate commerce exists. Contrary contentions of the Illinois state officials were shown to be unsound (59 I.C.C. at pages 359-363).

It further appears from the complaint and findings herein that the supplemental report and order, Exhibit A, like the original report and order, followed a nation-

wide investigation of freight and passenger rates and charges throughout the United States after the close of the First World War, as a result of which a 20% increase was permitted.[2] That proceeding was the first general rate case before the Commission following the World War. It was a so-called "general-revenue" case, in that it was an application by the railroads as a whole for a general rate increase necessary to meet increased costs.[3]

The 1925 order authorized a 20% increase in these intrastate commutation fares of the appellee in order to bring the level of such rates up to that of the interstate commutation rates which had previously been increased 20% as above noted. This authority was exerted under section 13 for the expressed purpose of thus eliminating the undue prejudice, preference and advantage in favor of intrastate commerce and the unjust discrimination against interstate commerce which the Commission found to exist by virtue of the 20% differential between the two classes of fares where the two classes of commerce were being served under substantially the same circumstances and conditions. That is to say, interstate and intrastate passengers traveled in the same cars, sometimes riding in the same seats, and received in all respects substantially the same service, for which the former paid 20% more than the latter[4] (R. 19, 21-2, 29-30).

[2] That proceeding was entitled "Ex Parte No. 74, *Increased Rates, 1920*". (58 I.C.C. 220 and reference thereto at 59 I.C.C. 354.)

[3] "In the administration of the interstate commerce act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i.e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general-revenue cases." *Increases in Intrastate Freight Rates*, 186 I.C.C. 615, 620.

[4] A like order, involving passenger fares in the adjoining State of Wisconsin, was sustained by a special district court of three judges in a proceeding identical with this case. This court affirmed. *Wisconsin R. R. Com. v. C. B. & Q. R. R.* 257 U. S. 563, 565-7.

Following the 1925 order, the Chicago and North Western Railway Company secured an interlocutory injunction restraining the Illinois Commission and other officials from interfering with its establishment and collection of the fares as then increased. The case was never carried further and the injunction still stands (R. 6, 51).

The 1925 order was of a continuing nature and contained an express provision that it should remain in force until further order of the Interstate Commerce Commission. This is specifically pleaded in the complaint, admitted by the appellants' motion, and set forth in the Court's findings here (R. 7, 51).

In 1936 a further general and nationwide investigation of railroad passenger fares took place. This proceeding was known as Docket No. 26550, Passenger Fares and Surcharges (214 I.C.C. 174). While the order in that proceeding resulted in no change in appellee's Illinois intrastate fares, nor in any Illinois commutation fares, either interstate or intrastate, the order contained, nevertheless, a specific reference to the 1925 order and Docket No. 11703 (Exhibit A) and the Commission thereby retained its continuing jurisdiction over appellee's Illinois intrastate commutation passenger fares. This is also pleaded, admitted and found (R. 7-8, 51).

Finally, in the most recent general-revenue case, the Interstate Commerce Commission again exercised its continuing power and jurisdiction over appellee's intrastate commutation passenger fares in Illinois. In that proceeding, Ex Parte 148, the Commission entered its order, with appropriate findings, authorizing a general 10% increase in passenger fares on January 21, 1942. The order is attached to the complaint herein as Exhibit B (R. 32-5). By reference to the 1936 proceeding, Docket No. 26550, the Commission made this 10% increase in passenger fares

specifically applicable to the fares which appellee had established pursuant to the 1925 order in Docket No. 11703, by expressly modifying that and other outstanding section 13 orders (R. 33, 53, 55).

This order of January 21, 1942, covered passenger fares only. On March 2, 1942, the Commission entered a further order granting authority for a general increase of freight rates, and issued its report with findings supporting both the passenger fare and freight rate increase. That report (248 I.C.C. 545-625) set forth, in considerable detail, additional findings and conclusions supporting both increases. As pleaded herein, it "renewed and affirmed" the findings of the January 21, 1942, order (R. 8-9).

It was in pursuance of the permission and authority thus granted to the appellee that he filed tariffs on February 6, 1942, with each the Illinois and the Interstate Commissions, setting forth charges with respect to this Illinois intrastate commutation passenger traffic 10% greater than those then in existence which were the ones authorized by the 1925 order. The effective date of these tariffs was March 8, 1942. The 10% increase therein stated is the matter here in controversy (R. 9, 53).

Had the 1942 order (Exhibit B) not modified the 1925 order and thus permitted the increase in fares here involved, the discrimination against interstate commerce found and ruled out in the 1925 order would have been at once revived. The findings in the 1925 order still stand and the Commission's authority over these fares still continues in effect. It was obviously necessary to raise the intrastate fares coincidental with the present raise of interstate fares if the relationship of equality found necessary and provided in 1925 was to be preserved. It seems hardly necessary to add that the presumption of correctness of the 1925 findings must necessarily continue until

a showing of changed conditions may justify their modification, in a direct proceeding before the Commission. For that matter the Court may well take judicial notice that the general character of the territory and operations involved has not changed materially. No mountain ranges have sprung up at the Illinois-Wisconsin state line since 1925 to produce different operating conditions interstate in this commutation traffic than exist intrastate. Nor are there any other material differences. And we may well assume that any change in conditions deemed by these appellants sufficient to justify a change in those 1925 findings, would now be made the subject of a complaint before the Interstsate Commerce Commission whose latchstring pointedly has been left hanging out.[5]

Appellants by their motion below have admitted these essential facts establishing the source and continuity of the Interstate Commerce Commission's control over these rates, admitted the existence of the findings in the 1925 order and the correctness thereof as pleaded in the complaint herein; and have admitted the existence of the 1936 order and the 1942 order retaining control and modifying the 1925 order so as to permit the increase here in question. Nevertheless, in their attack upon this rate increase they persist in treating the 1942 order as though it were a thing apart, having no connection or continuity with that which had gone before. In so doing they completely disregard and ignore the facts above mentioned, all of which were found by the Court showing that the 1942 order is *not a wholly new order.* It is simply an *amending and*

[5] The order expressly retains jurisdiction "for the purpose of determining, if need be, the lawfulness of any fare or fares, resulting from this order." (R. 34) Such is the procedure approved by the Commission and this Court. *Increases in Intrastate Rates*, 186 I.C.C. 615; *New England Divisions Case*, 261 U. S. 184, 197-9.

supplementing order.[6] It and the previous orders dealing with the intrastate commutation passenger fares of the Chicago and North Western Railway Company in Illinois, *taken together*[6a], completely establish appellee's right to these increases. This failure of appellants to recognize these undisputed facts constitutes, in our view, a fundamental weakness rendering their attack on the 1942 order completely ineffective.

II.

The Increased Passenger Fares Here Involved Were Authorized as a Result of Emergency Conditions in a "General-Revenue" Proceeding. It Granted Blanket Authority to Increase All Rates Described Therein in General Terms.

The Commission's report was before the Court at the hearing on the motion for interlocutory injunction and again on final hearing.[7] The character of the proceeding is best determined by certain facts found and statements made in the report, which may be summarized as follows:

1. The proceeding was instituted shortly after the carriers had been subjected to wage increases of approximately $331,000,000 per year resulting from a strike threat followed by Emergency Board action under the Railway Labor Act. Additional increased costs of $30,000,000 per

[6] Section 16(6), Interstate Commerce Act, vests the Commission with the broadest of power to modify or amend its orders: "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper." (49 U.S.C. 16(6).) Any reasonable modification of a continuing order, such as here, manifestly would be within the discretion of the Commission. *Federal Power Commission* v. *National Gas Pipe Line Company*, 315 U. S. 575, 585. The 1925 order was "supplemented and confirmed" by the 1942 order as was done in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312.

[6a] Obviously, they must be so taken. *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312; *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 428.

[7] The report was then available only in advance mimeographed form. Certain sheets thereof were reproduced and attached to appellee's statement opposing jurisdiction here, as Appendix C (p. 42-73). In this brief the references are to page numbers in Volume 248 of the Commission's printed official reports, beginning at p. 545.

year to protect their properties against sabotage during the war period, were also shown (p. 549-51).

2. The increases were requested for the specific purpose of yielding additional revenue to enable the carriers to meet the increased expenses and insure their ability to continue rendering adequate and efficient service as contemplated by section 15a of the Interstate Commerce Act (p. 551).

3. The petition for increased rates grew out of national emergency conditions incident to the war and the increases authorized will expire six months after termination of the war (p. 552, 613).

4. These increased operating costs were general in character and applicable to all traffic handled by the carriers, and the only practical method to meet them was a general percentage increase in all rates and fares, with certain exceptions not here material. The petition of the railroads called for a general investigation and estimated that the proposed increases would yield increased revenues of approximately $357,000,000 (p. 551-2).

5. The request was for a general increase in all rates and fares under the jurisdiction of the Commission, with specific reference to those covering intrastate traffic. Notice of the proceeding was given to the states as required by section 13(3) of the Interstate Commerce Act and a committee representing the State Commissions sat throughout the hearing, conferring with the Interstate Commission as to the determination of the issues. A majority of that committee concurred generally in the conclusion expressed in the report of the commission (p. 549, 551-2).

6. The case was characterized and treated by the Commission as a "revenue case, not a rate case" (p. 555). It involved no investigation or inquiry into specific rates or groups of rates (p. 552, 606-7, 609-13).

7. The inquiry relative to proposed increases in passenger fares was nation-wide and specifically included intrastate fares over which the Commission had jurisdiction by reason of previous outstanding 13th section orders. The purpose and intent of the carriers' petition and of the Commission's findings and order were to include an increase in such intrastate fares (p. 552, 549, 564-6). As pointed out above, the Commission's order of January 21st provided for such increase, by specific reference to docket numbers enumerated in the 1936 order (R. 33).

8. The "Conclusions and Findings" set forth in the Commission's report clearly state the general character of this proceeding. Commenting upon the general character of the evidence, the Commission said (p. 606):

> "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing."

The Conclusions also contain a short reference to previous general rate cases from 1917 to date involving blanket adjustments of freight and passenger fares, showing this to be the same type of case (p. 606-7). It is pointed out that "the exigencies of the case do not permit" of considering the needs of each railway individually with corresponding adjustment of their respective schedules (p. 609).

9. The authorized 10% passenger fare increase will yield increased revenue for the railroads as a whole in excess of $45,000,000 per year (p. 608).

10. The Commission's finding and conclusion in granting in part the requested freight rate increases is tied up with the passenger fare increases as follows (p. 612):

"We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable *if passenger fares are increased to the extent already permitted by our order*, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2." (Italics ours.)

A second fundamental and, we believe, fatal weakness in appellants' attack upon the 1942 order arises because of their failure to recognize Ex Parte 148 as a general-revenue or "blanket" rate proceeding. It will be shown later in this brief how this has led appellants into erroneous assumptions and arguments on both points relied upon.

III.

This "Blanket" Method of Rate Making in So-called "Emergency" or "General-Revenue" Cases Has Long Had Specific Approval by This Court.

In the *New England Divisions* case, 261 U. S. 184, the Court pointed out the greatly broadened scope of power and responsibility vested in the Interstate Commerce Commission by Transportation Act, 1920, particularly the requirement that the Commission fix and determine rates which would enable the railroads of the nation as a whole to maintain and operate an adequate national system of railroad transportation (p. 189-91).[7a] The case involved a subsidiary power of the Commission—that of fixing reasonable divisions of through rates between carriers. The number of carriers involved was said to be in excess of six hundred. The order was attacked because the Com-

[7a] In the Court's opinion in *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U. S. 266, 277, Mr. Justice Brandeis, in speaking of that enactment, said: "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; * * *"

mission had not proceeded to require specific evidence and render a specific adjudication with respect to each carrier. In rejecting that contention the court pointed out that such a requirement in a general case of that nature "would be tantamount to denying the possibility of granting relief" (p. 197).

The opinion by Mr. Justice Brandeis then proceeded to state the historical development of rate making under the Interstate Commerce Act and to find specifically no constitutional obstacle to the adoption or pursuit of this general method of rate making, and to show that it had been previously approved by the Court in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, where it was pointed out that serious injustice which might otherwise result from the making of rates in this manner by "blanket" orders "could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" (p. 197 9). Such is the saving clause in the Ex Parte 148 order.

Again in *United States* v. *Louisiana*, 290 U. S. 70, similar contentions were made in an attack upon an increased rate order of the Commission issued under section 13 raising certain intrastate rates in Louisiana. Following the doctrine of the *New England Divisions* case, the court said that section 13 (4) properly construed (p. 75):

> "confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. * * *
>
> "* * * § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a

> whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra,* 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

The opinion by Mr. Justice Stone goes on to point out that rates thus increased are subject to later adjustment as to any individual rate or group of rates upon a proper subsequent showing to the Commission (p. 76-8). There was a saving clause in the Commission's order similar to that mentioned above in the 1942 order here under consideration. The further complaint in that case that the Commission had made no express finding that the increased intrastate rates would be reasonable was rejected by the Court. It was held that no such specific finding was necessary since the order on its face showed its intent and effect prescribe a level of intrastate rates dovetailing with interstate rates prescribed by the Commission (p. 78).

Reaffirmance of this doctrine is presently at hand in the following quotation from the opinion by Mr. Chief Justice Stone, delivered in March, 1942, in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America,* 315 U. S. 575, 584:

> "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establish-

ing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modeled on the provisions of the Transportation Act, 49 U. S. C. §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See *New England Divisions Case*, *supra*, 201-02, 203, n. 21. Cf. Sharfman, The Interstate Commerce Commission, vol. 2, pp. 381-82; *Driscoll* v. *Edison Co.*, 307 U. S. 104."

IV.

The Interstate Commerce Commission's Power Under Sections 13 and 15 Is Paramount and Exclusive. It Has Been Exercised Here So as To Leave the Appellants Without Right, Power or Authority to Interfere With Collection of the Increased Fares.

This proposition is quite apparent from the doctrine of the *Wisconsin, New England Divisions* and *Louisiana* cases above. It has been so frequently stated in the decisions of this Court as to have become axiomatic. The paramount character of the authority exercised by the Federal Government is implicit in the power itself under our system of dual sovereignties. In this particular instance it is also written into the Federal Statute specifically by the requirement at the end of paragraph (4) of section 13 to the effect that the rates fixed by the Interstate Commission "shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

In section 13, Congress recorded its approval of the Commission's power to avoid discrimination by controlling *intrastate* rates, previously defined by this Court in the *Shreveport* case (*Houston & Texas Ry.* v. *United States*,

234 U. S. 342). As there stated: "It is of the essence of this power that, where it exists, it dominates" (p. 350).

This is but one of numerous Federal Statutes which have been sustained under the Commerce Clause by holdings of this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate. *Labor Board* v. *Fainblatt*, 306 U. S. 601.

In the *Wisconsin* case this Court referred to the provision in section 13 (4) giving the Commission power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" and said (257 U. S. at p. 586):

> "* * * it is impossible to escape the dovetail relationship between that provision and the purpose of § 15a."

This "dovetail relationship" was noted and reaffirmed in the *Louisiana Case* (290 U. S. at p. 78-9).

In *Florida* v. *United States*, 292 U. S. 1, 6, it was held, under later amendments of the Act, that the Commission still has the power under section 13 (4) to prescribe intrastate rates solely for the purpose of removing discrimination against interstate commerce "caused by a disparity of intrastate rates viewed from a revenue standpoint." It is definite on the face of the orders relied upon here that the purpose and effect of these orders is to do just that in this case. In the 1942 order the Commission found that the 10% increase *in all passenger fares* was necessary in order to enable the railroads to meet increased expenses arising during the present emergency period; that the increase was necessary to enable them to continue to render adequate and efficient railway transportation service during the emergency; that the increased fares would be rea-

sonable and lawful; and that all outstanding section 13 orders must be modified so as to permit the filing of tariffs naming the increased fares. In so doing, the Commission exercised authority under both sections 13 and 15.

In view of the Commission's previous findings in the 1925 order with respect to the necessity of bringing the Chicago and North Western Railway intrastate commutation fares up to and maintaining them at the level of the interstate commutation fares, it could not well have done otherwise in the 1942 order than was done by specifically modifying the 1925 order so as to provide for a 10% increase in these intrastate fares contemporaneously with the 10% increase in the interstate fares. To have done otherwise would have resulted in a revival of the discrimination against interstate commerce previously condemned in the 1925 order.

V.

Appellants' Attack Upon the Order in Ex Parte 148 Is Purely Collateral in Character. Hence the Order Must Be Given Full Effect Unless Shown To Be Void On Its Face.

The *Wisconsin Rate Case* (257 U. S. 563), as mentioned above, was identical with the case at bar in that it was instituted by a carrier to enjoin state authorities from interfering with intrastate passenger fares authorized by a section 13 order of the Commission. A companion decision rendered by this Court on the same day is *New York* v. *United States*, 257 U. S. 591, which involved the validity of intrastate passenger fares in New York likewise prescribed under authority of section 13. However, the *New York Case* was instituted by state officials, under section 208, Judicial Code, to review and set aside the section 13 order. Marking the distinction between the two cases, the Court said (p. 600):

"This case differs from the *Wisconsin Rate Case*, just decided, *ante*, 563, in that it is a direct proceeding to annul or set aside the order of the Interstate Commerce Commission complained of, brought against the United States and the Commission under the statute. *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. The *Wisconsin Rate Case* was a suit by a railroad against the state authorities to prevent the latter from penalizing the railroad for complying with the order of the Commission. To this suit the United States and the Commission were not parties. The defense of the state authorities was a collateral attack upon the order, to prevail in which, they were obliged to show that the order was void on the face of the findings *without regard to the evidence or the absence of it.*" (Italics ours.)

It will be noted at once that the appellants' attack here upon the 1942 order arises under circumstances quite parallel with those which existed in the *Wisconsin Rate Case*. The attack is purely collateral and in no sense does the case here take on the aspects of a direct attack involving a full judicial review of the 1942 order, and the proceedings, facts and findings supporting it. The extent and purpose of the court's inquiry here is to determine whether the order questioned by appellants was void or valid on its face.

VI.

The Cases Relied Upon By Appellants Are Not Applicable Here Because They Were Direct Proceedings To Set Aside the Orders Involved, None of Which was Entered In a General Revenue Case. In the Collateral Attack Here Appellants Have Failed to Show the 1942 Order to be Void On Its Face.

The cases cited in appellants' brief in no way impugn the 1942 general-revenue order. Four of them were *direct*

proceedings in which plaintiffs sought to set aside local rate orders. The fifth was a *direct* proceeding to enjoin the enforcement by state and federal officials of regulations under the National Industrial Recovery Act regarding the production of oil.

In contradistinction, we have here a case where the plaintiff sought protection of rights under orders asserted by him to be valid and where the defendants, attempting to prevent the exercise of plaintiff's rights, assert the invalidity of the second order—strictly a *collateral* attack. The appellant state officials participated in the Ex Parte 148 proceedings and had the right of direct attack by a suit against the United States and the Interstate Commerce Commission, in the statutory manner. They failed to avail themselves of this right of judicial review. Instead, they chose to ignore the Ex Parte 148 order and to act in the teeth of it by entering their so-called suspension order. We bring out in some detail below the inapplicability of these cases upon which appellants rely.

The *Florida Log Case* (*Florida* v. *United States*, 282 U. S. 194), involved rates on intrastate log traffic in a certain section of Florida and the question whether or not they were maintained at such a low level as to prejudice interstate traffic in logs between Florida and Georgia. Contrary to a statement contained in appellants' brief (p. 17), the case was one of *direct attack* and full judicial review of the Commission's order. The court pointed out that the Commission had erroneously undertaken to remove an asserted discrimination against interstate commerce by prescribing a state-wide scale of intrastate log rates, without having prescribed a state-wide scale of interstate log rates or made any findings as to the revenue produced or to be produced by either the interstate rates or the intrastate rates. Hence there was no basis for the Commission's find-

ing of discrimination against interstate commerce. That ultimate finding, standing in lack of supporting findings, was held insufficient to support the Commission's order (p. 212,3).

That was an entirely different situation from what we have here where all basic and jurisdictional findings were made to support the discrimination order in 1925 and the general revenue order in the 1942 case. Furthermore, this is admittedly a collateral attack upon the orders of the Commission here involved, and all with which this Court need concern itself are the questions: Is the Interstate Commerce Commission's 1942 order, amending the 1925 order, *upon its face*, a valid order or a void order? Does it show on its face that the Commission acted within a field over which Congress had given it power to act? If so, the order must be sustained. Taking the two orders together, as must necessarily be done, their validity and adequacy in the face of this kind of attack are clear beyond any question.

Like the *Florida Log Case*, the *Indiana Coal case*, (United *States* v. *C. M. St. P. & P. R. R.*, 294 U. S. 499) was a proceeding to enjoin the enforcement of an Interstate Commerce Commission order—a direct judicial review of the order. It involved a local rate situation entirely. In each case the full record before the Commission, including the evidence, was before the Court for review. There is not, and cannot be, any such situation before this Court in the kind of proceeding we have here. This is made clear by the procedural distinction between the cases of *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, 257 U. S. 591, above cited.

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48, also relied upon by the appellants here, was another case of direct attack and full judicial review of a commission order. It was an injunction suit against the Kansas Public Utilities

Commission to set aside that Commisson's order permitting a utility company to increase its rates for electricity. The Commission in permitting the increase simply found that the utility "should be authorized and permitted" to do so (p. 51), without any finding that the old rates were unreasonably low or that the new rates would be reasonable—in fact, without any other finding at all. Since the Kansas Commission's power to take any action in that matter derived exclusively from the Kansas statute giving it the power to prescribe rates to replace rates found to be unreasonable, its order necessarily fell because on its face it was lacking in any expression showing that the Commission had acted within the scope of its authority.

Atchison Ry. v. *United States*, 295 U. S. 193, offers nothing on the subject not already covered in the previous discussion. The basic facts upon which the Commission's decision rested were not disclosed and no definite finding was made as to where the transportation of live stock by a common carrier ends—that being the crucial question involved. The report of the Commission contained conflicting findings and conclusions in that behalf (p. 201-2). Hence, on direct attack the order was set aside. In the *"Hot Oil" Case* (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388) the President's proclamation issued without any finding of fact or statement of reason purporting to justify its issuance was rightly condemned and held unenforceable. Sec. 9(c) of the National Industrial Recovery Act did not require any finding and it was held to be an unconstitutional attempt to delegate legislative power. These decisions, like the others relied upon by appellants, are inapplicable here for the reasons above stated.

Frequently Commission decisions make supporting findings as to various factual elements involved,[8] but these

[8] As we have pointed out, the Commission did so in its Ex Parte 148 report and orders.

while encouraged by the courts and helpful in cases of direct review, are not essential and their absence will not render a Commission decision void, where the decision contains sufficient, otherwise, to show that the Commission acted within the scope of its statutory authority. Only the basic or "quasi-jurisdictional" findings need appear, even in *direct* proceedings of judicial review. *United States* v. *B & O. R. R. Co.*, 293 U. S. 454, 463-5. In that case under the Locomotive Inspection law the Commission had no authority to prescribe power reverse gear equipment upon locomotives unless such installations would eliminate or reduce "unnecessary peril to life or limb." The Commission's report and order in that case contained no such finding and the Court therefore held that its order prescribing such installations was void (p. 463). Compare *Lubetich* v. *United States*, 315 U. S. 57, 59, where, on direct appeal, omitted findings were held not quasi-jurisdictional and the order was upheld.

The quasi-jurisdictional findings appear on the face of the orders here. In the 1925 section 13 proceeding the Commission found (1) no conditions within Illinois justifying the maintenance of intrastate commutation passenger fares lower than the corresponding interstate fares, (2) the maintenance of such lower intrastate fares subjects interstate passengers to undue prejudice and disadvantage and unjustly discriminates against interstate commerce, and (3) to remove that discrimination the intrastate fares should be raised to the level of the interstate fares (R. 30). Those findings are now supplemented by the findings in the 1942 order (1) that the increase in fares proposed is necessary to enable petitioners to continue rendering adequate and efficient railway transportation service during the present emergency, and (2) that the increased fares are reasonable and lawful (R. 33). By these findings action by the Commission within the juris-

diction conferred upon it in sections 13 and 15 of the Interstate Commerce Act is established. These, and these alone, were the basic or quasi-jurisdictional findings such as have been held essential in direct proceedings of review.[8a]

However, additional findings were made in Ex Parte 148. The Commission's report shows that from evidence of a general nature it found the carriers needed increased revenues due to increased expenses during this emergency period; that these expenses were arising in the handling of all kinds of traffic everywhere, including passenger traffic of all kinds; that the passenger traffic should bear its share of the increased cost; that the proposed increased passenger fares would produce $45,000,000 per year and upwards; that this would be an appropriate amount for the passenger traffic as a whole to bear; that the general 10% increase should be spread upon all passenger rates subject to the Commission's jurisdiction, including those prescribed in previous section 13 proceedings and with specific reference to the very rates involved in this case, referring to them by specific docket number; and that the exigencies of the case did not permit of further refinements such as considering the needs of individual railroads and adjusting their rate schedules separately.

In Ex Parte 148, the "paramount question" under the applicable statutes was simply whether or not a general raise of the level of *all* rates was needed in order to maintain an adequate national rail transportation system. The Commission, in the terms of the statute, found the proposed increase in passenger fares was "necessary," "reasonable" and "lawful". (R. 33). These quasi-jurisdictional findings, alone, would have been sufficient to sup-

[8a] The "two sets of findings" should be "read together", *Atlantic Coast Line v. Florida*, 295 U. S. 301, 312, cited in note [6a], supra.

port the order against a direct attack; but regardless of that they show the order valid on its face and hence invulnerable to the collateral attack in this suit. The further detailed supporting findings, summarized above, show that the order would have been immune to attack on direct review in any case.

The lack of substance in appellants' point as to the inadequacy of findings in the 1942 order is further demonstrated by reference to that part of appellants' brief entitled "The Application of the Foregoing Authorities to the Findings in the Instant Case" (p. 27-8). There, the only *specific* complaints made as to lack of findings are these:

1. That there was "no finding of fact showing that the rates before the authorized increase were confiscatory"; and

2. That the findings did not "indicate the 'extent' of the inadequacy of the previous rate structure or 'expected loss' or deficit to be anticipated from the previous rates."

In fine, appellants' contentions narrow down to the proposition that the absence of these specified findings has denied them due process of law. Such is the final assertion in their behalf and they endeavor to give it force by quoting excerpts from the decisions which we have analyzed above, which they characterize as "independent proceedings in equity."

That any finding in the Ex Parte 148 order, as to rates being confiscatory, would have been entirely inappropriate and beyond the scope of the investigation in that proceeding is obvious in view of the nature of the proceeding. The carriers in proving their need for increased revenues to meet the huge wage increase and other expense suddenly imposed upon them in excess of $350,000,000 per year had no occasion to attack the previously existing general rate level as confiscatory. The only issue before the

Commission was whether or not the carriers would need a general rate increase in order that they might function properly during the war and be enabled to render needed transportation for the nation during the emergency period. The facts found by the Commission showed the need. Authority to make the increase in rates was granted by the Commission precisely as the congressional mandate required (49 U. S. C. Sec. 1, 13 and 15a, *supra*). The Commission in its report said:

> "The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency" (248 I.C.C. at p. 613).

Likewise, there was no occasion for the Commission to make any findings as to the extent of inadequacy of the then existing rate level or any expected loss or deficit. The Commission found these huge increased costs had been suddenly imposed upon the carriers. These were out-of-pocket costs. The need for more revenue was plain and imperative. The only question was "how much." The Commission in its discretion granted less than was estimated to meet the increased costs, but granted prompt relief.

As we have pointed out above, the general character of the proceeding precluded individual consideration of local rate situations. The findings of the 1925 order as to the intrastate suburban fares yielding less than operating costs and the necessity for maintaining them on the interstate level were not made the subject of special investigation and re-examination in Ex Parte 148. That part of the national rate structure "held" and "maintained" by previous orders of the Commission, received the same consideration and treatment as all others. Previous findings in individual cases were not modified or

disturbed and there was no occasion for so doing. Any injustice which might arise from the imposition of this 10% increase upon the previously prescribed rates was open to correction by appropriate application and showing in the individual case. If the appellants had any doubt as to the present accuracy of the 1925 findings, the "saving clause" pointed their course. Thereby, the 10% increase applied to these Illinois intrastate rates in the general-revenue case met the test of constitutional rate-making approved by this Court.

VII.

The Claim That the Ex Parte 148 Order Does Not Purport to Authorize These Increased Rates Is Disproven by Both the Purpose and the Plain Terms of the Order, Which Are Confirmed by a Later Order of the Commission.

Adopting the devious argument of the *Transit Commission case*, appellants contend the effect of the Ex Parte 148 order was merely to withdraw generally Interstate Commerce Commission opposition to increases in intrastate rates. The argument is built up to that point by taking the word "permit" (used in the order) out of its context and giving it a literal and independent meaning. To support their conclusion the false premise is indulged in that there existed some Federal opposition to increases in intrastate rates—an assumption belied by the whole tenor and effect of the Interstate Commerce Commission's report and order.

The Federal Government represented by the agency of Congress fully authorized to act, here determined the necessity for increasing *all* passenger fares, both *interstate* and *intrastate*. It went further. It specifically provided for the increase of certain intrastate fares, of which it had previously taken jurisdiction, by amending its orders

previously entered and then outstanding so as to provide for such increase. The amending order was, by its terms, required to be filed in the docket of each proceeding in which those previously entered orders had been made (R. 33). Such filing having been made, thereby modification of the outstanding orders was completed. Specific reference was made to section 13 cases in which the Commission then held jurisdiction over intrastate rates (including those here involved). Its outstanding orders respecting these rates were singled out as a class from all other outstanding orders, to make doubly sure the Commission's intention and purpose to authorize the 10% raise of *intra*state as well as *inter*state rates subject to its jurisdiction.

Surely it is perversion itself to suggest, as is here suggested, that the word "permit" was used to indicate a withdrawal of federal opposition of some vague kind or other to the proposed increase in these intrastate rates. For that matter, what objection could the federal agency *ever* have in *any* case against intrastate rates being brought up to, or maintained on, a level of equality with interstate rates? The history and existence of section 13, referred to above, prove the Commission could only have objections in cases where intrastate rates were being reduced or maintained at a level *below* the interstate rates.

The further conclusion of the New York Judge that the word "permit" was used so that the carriers would be free to make increased fare applications to state regulatory bodies is even less worthy than the first assumption. The pertinent part of the order reads (R. 33):

> "* * * all outstanding orders, as amended, * * * authorizing or prescribing *interstate and intrastate rates* or *bases of fares*, be, and they *are hereby, modified*, effective *concurrently with the establishment of the fares herein approved, only to the extent neces-*

sary to permit the increase herein authorized to be *added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of,* said outstanding orders. * * *" (Italics ours.)

There was, of course, no permission of the Interstate Commerce Commission needed by any carrier to enable it to make increased rate applications to state authorities with respect to such intrastate rates or fares as were not already subjected to control by the federal agency. And as to intrastate rates which had been previously subjected to such control—*i.e.*, "prescribed in" and "maintained" and "held by virtue of" outstanding section 13 orders—there could be, equally, no occasion either for the carriers to seek, or the Interstate Commission to grant, permission to apply to state authorities. Being already fully under the Interstate Commerce Commission's paramount and exclusive jurisdiction and control, previously exercised and re-exercised, "maintained" and "held," applications to state authorities would have been improper and contradictory in the extreme. Had the Interstate Commission intended such course to be pursued an obvious prerequisite would have been to relinquish its control over those rates. This it has not done, but on the contrary it has in plain and unambiguous terms *retained* and *again exercised* its jurisdiction and control. To argue that permission was granted without such a specific relinquishment of control is to argue the ultimate of incongruity. Not only would "interstate trade * * * be * * * impeded by the rivalries of local governments,"[9] but there would be inevitable conflict and discrimination due to varying rate levels prescribed by numerous state commissions —the rule "by many masters"[10] to avoid which these outstanding orders were made.

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[9] *Shreveport Case*, 234 U. S. 342, 350.

[10] *Shreveport Case*, 234 U. S. 342, 359-60.

There is no difficulty in understanding the Commission's use of the word "permit" in the context of its order wherein it amended its previous outstanding orders, when one considers for a moment the mechanics of this rate increase. Ex Parte 148 being a general proceeding and having been initiated by the carriers in advance of their filing of any tariffs, the Commission's order itself necessarily could not establish the increased rates and fares. That could only be accomplished by the subsequent action of the carriers in filing new or supplemental tariffs with respect to the very great number of rates and fares in existence all over the country and set forth in numerous existing tariffs already on file. The carriers' petition in Ex Parte 148 was in the form of a request for permission from the Interstate Commerce Commission to file such new or supplemental tariffs naming increased charges. This is shown by the very first paragraph of the Commission's report, which states that the railroads "ask us to make certain orders necessary to enable them to increase their rates, fares and charges." Referring further to this requested general authorization, the Commission said (248 I.C.C. at p. 552): "In order to make such authorization effective, *it will be necessary for petitioners to have permission to make such increases effective on short notice*, by simple forms of supplements to existing schedules. *It also will be requisite that we modify our outstanding orders to the extent necessary to permit petitioners to make effective the increases approved by us*, and to enter orders authorizing departures from section 4 of the act." (Italics ours.) And the order itself points out some particulars as to how the permitted tariffs or supplements may be submitted and filed and the time when they may become effective. It established a *basis* for the new and increased rates, but did not establish the rates.

In other words, instead of proceeding as is customary with respect to local or group rate changes by filing tariffs or tariff supplements, and then waiting to see whether or not opposition develops and the tariffs are suspended pending hearing and consideration by the Interstate Commerce Commission, the carriers here proceeded by the other method which we have pointed out had been expressly approved by the Supreme Court in other general cases. That is to say, the carriers sought permission to file, and approval of, their proposed tariffs *in advance* and upon less than the thirty day statutory notice. Hence, the use of the word "permit," a perfectly well chosen word in the situation in which it was used.

The use of the word "permit" was also particularly well chosen with respect to rates authorized or prescribed in outstanding orders like that in Docket 11703, here involved, wherein the carrier had previously been "notified and required to cease and desist from practicing * * * unjust discrimination" and had been ordered "to establish, put in force, and maintain" the then approved basis of rates "until the further order of this commission" (R. 31). In modifying that mandate, what form of expression could have been more appropriate than that adopted? The expression used made it clear that the old command was modified so as to permit 10% to be added to the previously prescribed rates and that this was the only change permitted. The carriers' petitions and the Commission's report in Ex Parte 148 leave no room for contention that anything else was intended or desired. The 1925 order in Docket 11703, as thus modified, now requires appellee to "maintain" the increased fares named in the tariffs effective March 8, 1942, those tariffs not having been suspended by the Interstate Commerce Commission. Failure to observe those tariffs would subject appellee to severe

penalties under sections 6 and 10 of the Interstate Commerce Act. (R. 12; 49 U.S.C. 6(7), 10(1).)[10a] The mandatory aspect of the 1925 order has not been affected by the 1942 modification.

The New York judge also fell into error by attaching an undue significance to that part of the recitals in the Interstate Commerce Commission's 1942 order which states that "* * * similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges, * * *." Such applications were necessary as to the great residuary body of intrastate rates and fares of which the Interstate Commerce Commission has never had occasion to take section 13 jurisdiction. Not all states refused after 1920 to raise the level of intrastate rates to conform to that of the interstate rates. Those that did not so refuse still have jurisdiction over their own state rates. They will continue to have it unless and until there is occasion to file a section 13 complaint and obtain a finding of undue discrimination against interstate commerce. Hence the necessity for petitions to state authorities as to a great mass of intrastate rates *not, however, including those as to which section 13 orders already were outstanding.* The propriety of the recital is therefore evident. Its presence in the order is completely accounted for without indulging in the wholly mistaken assumption made by the New York judge that it is indicative of an intent by the Interstate Commerce Commission that the carriers would or should go to the State Commissions in the section 13 instances.

To adopt appellants' contention would render completely ineffective that very substantial part of the Commission's order in Ex Parte 148 which authorizes the 10% increase

[10a] "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court." *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311.

in intrastate passenger fares of which it had previously taken jurisdiction under the congressional mandate of section 13, Interstate Commerce Act. No less than 22 such cases are listed by docket number in the 1936 order of the Interstate Commerce Commission, and included by specific reference in the 1942 order. Among them is Docket No. 11703, involved here. To so construe this order as to nullify such a substantial portion of it would do violence alike to common sense and the legal principles to which we have referred above.

Furthermore, if the Interstate Commerce Commission did not intend its amendment of outstanding section 13 orders to permit, of itself and without State Commission action, the raising of state rates under the continuing control of the Interstate Commerce Commission by ten per cent, the latter Commission would have suspended the tariffs scheduled to become effective March 8, 1942, as to those intrastate rates, pending State Commission approval. This it did not do, though by that time it had become clear, in the case of these Illinois intrastate commutation fares at least, that the raise was being scheduled solely on Interstate Commerce Commission authority.

If, with reason, any doubt ever could have existed about the *intent* of the Interstate Commerce Commission's 1942 order, that doubt must have been completely dispelled by the Commission's own action through its order of March 24, 1942, in Docket No. 11860, *Montana Rates and Fares*, Appendix A hereto. It is seen therefrom that a section 13 order entered in 1921 had required the maintenance of intrastate fares on the same basis as interstate fares in Montana; that in 1938 the Interstate Commerce Commission, finding that the State authority theretofore had adopted the same bases of fares as those which it required interstate, vacated its 1921 order because it no longer served

any necessary or useful purpose; and that in view of the disparity between the Montana intrastate rates and the proposed increased interstate rates under the order in Ex Parte 148, the vacation of the old 1921 Montana order has now been set aside as improvidently entered and it has been revived so as to "protect" the Montana intrastate rates and make them subject to the present 10% increase, the same as the interstate rates. The present situation in Montana is specifically found to justify "the continued maintenance and observance of" the 1921 order as modified. If, as appellants claim, the order in Ex Parte 148 was merely a permission to the carriers to go back to state authorities where section 13 orders were outstanding, no action at all by the Interstate Commerce Commission would have been necessary in the Montana situation, *because there was no outstanding section 13 order, the original one having been vacated.* But the Commission, by *reinstating* the section 13 order previously vacated, put the Montana intrastate fares up to the interstate level through the application of its order in Ex Parte 148 in precisely the way that these Illinois intrastate commutation fares were increased.

This demonstrates, perhaps more forcefully than anything we might say, the Interstate Commerce Commission's belief and intention as to the validity and effectiveness of its order here in question, as respects its applicability to increases in intrastate rates already within its control under section 13. There is and can be nothing substantial in appellants' contrary contention.

VIII.

As An Independent Ground of Relief, Enforcement of the Appellant Commission's Order was Properly Enjoined Because the Fares Thereby Prescribed Were Admittedly Confiscatory.

The Interstate Commerce Commission found in its 1922 order that the 20% increase in Illinois intrastate commut

tation fares thereby permitted would still fail to produce sufficient revenue to fully meet the cost of rendering the service (R. 26). The complaint herein shows that the expenses necessarily incurred in furnishing this service have greatly increased since 1925; that heretofore appellee has been furnishing the service at a total expense considerably in excess of the total revenues derived therefrom; and that when the complaint was filed (after the effective date of the increased fares here involved) the service was still being furnished at a loss and without any return upon the more than $20,000,000 value of the property used by appellee in rendering the service (Section XIV, R. 14).

The Court found that the purport and effect of the appellant Commission's order of February 18, 1942, was to prescribe fares for the appellee at the previously existing noncompensatory level and to prohibit the appellee from increasing or modifying those fares unless and until permitted to do so by further order of the appellant Commission at some indefinite time in the future; that the fares thus prescribed would not produce sufficient revenue to meet the cost of the service; that for some years such service had been rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property devoted to the service; and that even with the increase therein made effective March 8, 1942, as authorized by the Interstate Commerce Commission, the appellee is still realizing a loss from this service and deriving no return whatsoever upon the property investment (Findings 11-13, inclusive; R. 53). The Court concluded that enforcement of the appellant Commission's order imposing these confiscatory rates would deprive appellee of his property without due process of law in violation of Amendment XIV (Conclusion 5; R. 56).

The appellant Commission's order (R. 35-7), called a "suspension order," undertook to establish these admittedly confiscatory rates "until the period of suspension and any extension thereof has expired." The immediate period of suspension stated in the order was until July 6, 1942. However, that Commission is given authority under section 36 of the Public Utilities Act of Illinois to extend this suspension period for an additional six months. (R. 11; Appellants' Brief, 3, Ill. Rev. Stat., Ch. 111⅔, § 36).

In *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49-50, where it was shown that rates yielding less than a fair return were sought to be imposed on a temporary basis pending further procedure before the New York Commission, it was specifically held that the temporary character of the rates would not deprive the company of its right to relief at the hands of the court. Referring to the New York Commission's orders prescribing those rates, the Court said (p. 49):

> "They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

Again in *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, where the rates fixed by the Washington State Commission were for an experimental period of twelve months and where, *as here*, the carriers showed the rates so fixed would not yield sufficient revenue to meet fully the operating expenses, the Court, in holding the carriers entitled to an injunction, said (p. 45):

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the principle of awaiting the result of an experimental period for untried rates have no application here." (Citing cases.)

Believing these decisions state sound legal principles fully applicable to the instant case, appellee asserts that here is an additional and independent ground upon which the decision below should be affirmed. Assuming for argument's sake, that the defendant Commission had jurisdiction over the rates here involved, since it has admitted they are now confiscatory and that even the new rates do not produce revenue equalling the cost of the service, what right or purpose possibly could have been served by further procedure before that Commission?

That its order prescribing the admittedly confiscatory rates was entered without previous notice to plaintiff and without hearing, we assume will not be urged to support the argument made in appellants' reply to appellee's motion to dismiss that the issue of confiscation should have been raised by appellee and tried out before the defendant Commission. That Commission already knew from its participation in the I.C.C. Docket No. 11703 proceeding and the 1925 order that the rates which it, in 1942, was attempting to prescribe were confiscatory; and it now admits that the increased rates which it attempts to nullify are not compensatory. This is a situation quite different from the usual type of rate case involving the element of confiscation. We believe this extraordinary instance of a State

Commission seeking to enforce rates known and admitted by it to be confiscatory brings the case within the rule of the authorities we have cited.

Since the requisite "zone of reasonableness"[11] was known in advance to have been non-existent there obviously could have been no room for any exercise of the defendant Commission's rate making process. The constitutional requirement of due process demands no such futility of action.

CONCLUSION.

The Interstate Commerce Commission in its 1942 order further exercised its retained jurisdiction over the intrastate fares here involved by modifying its previous section 13 order so as to authorize fares 10% higher than those by it prescribed in 1925.

Its intention and purpose in so doing are clear on the face of its order and are confirmed by its failure to suspend the tariffs and by its subsequent order in the *Montana* Case.

Contrary to appellants' contentions, the findings were adequate to support the order. They were sufficient for all purposes, although in this case of collateral attack the inquiry goes no further than to determine validity on the face of the order.

[11] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

The District Court's decision should be sustained for the foregoing reasons and on the further independent ground that the pre-existing rates sought to be enforced upon appellee by appellants were admittedly confiscatory.

We therefore respectfully submit that the judgment of the District Court should be affirmed.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company,
Appellee,

By WILLIAM T. FARICY,
NYE F. MOREHOUSE,
P. F. GAULT,
His Attorneys.

December 28, 1942.

APPENDIX A.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 24th day of March, A. D. 1942.

No. 11860

MONTANA RATES AND FARES

In the Matter of Intrastate Rates and Fares of the Chicago, Burlington & Quincy Railroad Company and Other Carriers in the State of Montana

IT APPEARING, That the Commission on March 31, 1938, made its order in the above-entitled and other proceedings therein listed requiring the parties to the respective proceedings to show cause on or before May 4, 1938, why orders previously entered in such proceedings and still outstanding should not be vacated and set aside in so far as they require the continued maintenance and observance of the rates, fares, charges, allowances, rules, regulations, or practices, separately prescribed in said outstanding orders;

IT FURTHER APPEARING, That with respect to this proceeding the said order of March 31, 1938, had reference to the outstanding order of January 11, 1921, as modified, made upon report appearing at 60 I.C.C. 61, which latter order prescribed for the removal of the unlawfulness therein found, the interstate bases of fares for the transportation of passengers, of excess-baggage charges, and of surcharges upon passengers traveling in sleeping cars and parlor cars, for application on intrastate commerce within the State of Montana, because the interstate bases in effect when said order of March 31, 1938, was made were on the same or practically the same bases as required by State authority, and that therefore the continuance in force and effect of said outstanding order served no necessary or useful purpose;

IT FURTHER APPEARING, That no return was filed by any party to said order of March 31, 1938, whereupon the

Commission on June 6, 1938, made its order in all those proceedings by which all said outstanding orders, in so far as they required such continued maintenance and observance, were vacated and set aside

IT FURTHER APPEARING, That railroad carriers operating within the State of Montana, by petition solely in this proceeding filed February 4, 1942, inform the Commission that through oversight these petitioners failed to show cause in response to said order of March 31, 1938, why said order of January 11, 1921, should not have been vacated and set aside, and aver that for this reason the intrastate passenger fares in Montana are technically no longer protected by an outstanding order made pursuant to section 13 of the Interstate Commerce Act; that by order of January 21, 1942, in Docket Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, this Commission approved increased passenger fares, reflecting an increase of 10 percent over then present fares, as proposed by railroads throughout the United States, which increased fares became effective February 10, 1942, on interstate traffic, and that said order of January 21, 1942, modified all outstanding orders to the extent necessary to permit the increase authorized by said order of January 21, 1942, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that, inasmuch as said order of January 11, 1921, has been vacated, and a statute of the State of Montana prescribes a basis for maximum fares which would be exceeded if the Montana intrastate fares were all increased by 10 percent, petitioners pray that the Commission reinstate said order of January 11, 1921, upon the ground that the latter order was vacated improvidently by said order of June 6, 1938;

IT FURTHER APPEARING, That no reply to said petition has been received from any party, although the petition was duly served upon all parties by these petitioners by mailing a copy to each of them;

AND IT FURTHER APPEARING, That the existence of said statute affords good cause for the continued maintenance and observance of said order of January 11, 1921, as modified, and that therefore said order of June 6, 1938 was made improvidently.

IT IS ORDERED, That said order of June 6, 1938, in so far as it relates to this proceeding, be, and it is hereby, vacated and set aside; that said order of January 11, 1921, as modified prior to June 6, 1938, is restored and reinstated; and that this order shall take effect April 4, 1942.

By the Commission.

(SEAL.) W. P. BARTEL,
Secretary.

APPENDIX B.

Interstate Commerce Act.

National Transportation Policy.

(49 U.S.C.A. Ch. 1, pocket part, p. 3)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this

Act (chapters 1, 8, and 12 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 13

(49 U.S.C.A. § 13 (3)-(4), pocket part, p. 82)

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the

rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2)

(49 U. S. C. A. § 15a (2), pocket part, p. 114)

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the *movement of traffic* by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.